Office Supreme Court, U.S.
FILED
NOV 17 1964
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1964.

No. 542.

ANTHONY GIANFRANCESCO,

Petitioner,

vs.

THE STATE OF OHIO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF FOR THE STATE OF OHIO IN OPPOSITION.

LYNN B. GRIFFITH, JR.,
Prosecuting Attorney,
Trumbull County Court House,
Warren, Ohio,
Attorney for Respondent.

EDWARD LANE WILLIAMS,
1101-3 Union National Bank Building,
Youngstown 3, Ohio,
Attorney for Petitioner.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—PHONE: 621-8647

TABLE OF CONTENTS.

Opinions Below 1

Jurisdiction 1

Statement of Facts 2

Questions Presented 5

Argument 6

Conclusion 12

Appendix:

A. Statutes 13

B. Opinion of the Court of Appeals of Trumbull County, Ohio 15

C. Appellant's Assignment of Errors in the Supreme Court of Ohio 18

TABLE OF AUTHORITIES.

Cases.

Babcock v. Perkins, 165 O. S. 185 10

Clarington v. Althear, 122 O. S. 608 8

Cuthbertson v. State, 106 O. S. 658 8

Decker v. State, 113 O. S. 512 6

Dunning vs. Cincinnati, 21 O. N. P. N. S. 468 6

Hanlon v. McAlpin Company, 175 O. S. 517 10

Houck v. State, 106 O. S. 195 6

Patterson v. State, 96 O. S. 90 8

People v. Laningin, 140 P. (2d) 124 9

State v. Jefferson, 34 A. (2d) 881 10

Thomas v. Mills, 117 O. S 119 9

U. S. v. Pierce, 124 F. Supp. 264 6

Texts.

82 *A. L. R.* 782 6

Black's Law Dictionary 9

50 *C. J. S.* 1083 10

3 *O. J.* (2d) 38 8

3 *O. J.* (2d) 40 8

Statutes.

Ohio Revised Code:

Section 2313.37 ..... 8, 11, 14

Section 2915.13 ..... 4, 6, 13

Section 2935.04 ..... 6, 13

Section 2945.29 ..... 9, 11, 13

In the Supreme Court of the United States

OCTOBER TERM, 1964.

No. .....

ANTHONY GIANFRANCESCO,

Petitioner,

vs.

THE STATE OF OHIO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF FOR THE STATE OF OHIO IN OPPOSITION.

OPINIONS BELOW.

There is no opinion of the trial court in this case, the opinion of the Court of Appeals, Seventh Judicial District, State of Ohio, is set out in Appendix A. This opinion was journalized as included in Petitioner's brief set out in Appendix B. The Supreme Court of Ohio issued no written opinion, but merely journalized their entry sustaining the Court below. These decisions are unreported.

JURISDICTION.

The jurisdiction of this Court is not properly invoked with respect to either the first question presented or the second question presented for the reason that the questions presented therein were not properly raised in the State Courts.

STATEMENT OF FACTS.

In September of 1962 the Youngstown Police received information that the parking lot of the North Side Hospital in Youngstown, Ohio was being used as a station for exchange of number slips and money by numbers operators. Acting upon this information, on October 1, 1962, Patrolman Harold Parker was assigned to make surveillance of any such activities from the roof of the North Side Hospital. This surveillance was carried on October 2nd, October 3rd and October 5th. Mr. Parker took with him binoculars as well as a camera with a telescopic lens. At about 3:30 in the afternoon on October 1st, Anthony Gianfrancesco drove into the parking lot and parked. He sat in his car counting white slips of paper. Shortly after his arrival, Joseph Mosco pulled into the parking lot, got out of his car, got into Mr. Gianfrancesco's car. The two of them would continue to count the slips and money in the Gianfrancesco auto. Shortly thereafter a third car pulled into the parking lot, Mr. Gianfrancesco got out of his car, went to the passenger side of the third car, received a brown paper bag and ran back to his own car. Mr. Mosco got out of the Gianfrancesco car, got into his own car and all subjects left. This same procedure was observed on the 2nd of October and on the 4th of October. This operation was viewed through binoculars and photographed through a telescopic lens camera and the photographs were admitted into evidence as State's Exhibits 2 through 12. The Buick with license number J1100B has been identified as the Gianfrancesco auto. The Ford with license number J1232W was identified as the Mosco auto and the Cadillac with license number J932X was the auto that Willie Baker arrived in.

After three days of surveillance and consultation with the Mahoning County Prosecutor's Office, it was decided to

close in on the operation on October 5, 1962. Two officers were stationed on the roof of the North Side Hospital at about 3:20 in the afternoon of October 5th, one with binoculars and the second one with a radio which could convey messages to the men on the ground. These men were Officers Parker and Maggianetti. On the ground in a private automobile of one of the police officers were Officers Friednamer, Gallagher and Bunyoff. These three officers were concealed in the automobile with a transistor receiver awaiting a signal from the officers on top of the hospital roof. Upon receiving such signal, Officers Bunyoff and Friednamer got out of the car and ran over past the Gianfrancesco automobile and into the drive area and placed Gianfrancesco and Mosco under arrest. Officer Gallagher pulled the automobile into the driveway of the North Side parking lot to block the attempted escape of Mr. Willie Baker and his driver, R. J. Manuel. Other officers arrived from concealment. In the Gianfrancesco car were the following items: money wrappers found on the front seat of the Gianfrancesco car marked State's Exhibit 19; $308.00 in currency marked State's Exhibit 20 also found in the front seat of the Gianfrancesco car; a bag full of number slips marked State's Exhibit 21 found in the front seat of the Gianfrancesco car; a large box with five green wrapped packages of number pads and six loose white pads of blank numbers pads marked State's Exhibit 23 and a little brown bag under the front seat containing $9.22 marked State's Exhibit 26. In the car in which Willie Baker was an occupant, in the front seat was found a paper bag containing 103 numbers slips which is identified as State's Exhibit 25. In the Mosco automobile were found 103 numbers slips which are marked State's Exhibit 1. Subsequently, after indictment, Manuel, Baker and Mosco all pleaded guilty in Trumbull County Common Pleas

Court to Promoting a Numbers Operation, were sentenced and have served out their sentences.

On April 18, 1963, this defendant was indicted by the Trumbull County Grand Jury for violation of Section 2915.13 charging that he did unlawfully carry on a scheme of chance known as policy, numbers game, or clearing house in violation of such section. The defendant pleaded not guilty and on June 4, 1963 trial was commenced. On June 6, 1963 the defendant was found guilty by the jury and sentenced to pay a fine of $500.00 and costs and sentenced to the Ohio Penitentiary for a period of one to ten years. Execution of sentence was suspended pending appeal.

On July 2nd, 1963, the defendant's motion for a new trial was overruled and an appeal was perfected to the Seventh District Court of Appeals assigning two Assignments of Error:

> 1. The Court erred in the admission of evidence contrary to law and in substantial violation of the Constitution and the laws of the State of Ohio.
>
> 2. The Judgment and finding of "guilty" is contrary to law and against the manifest weight of the evidence.

The first assignment of error in the Court of Appeals was based upon the allegation that the number slips found in other automobiles were not relevant. No question was raised as to the legality of the search which was being conducted at the time of the commission of a felony in the presence of these police officers, namely, the violation of Ohio Revised Code Section 2915.13 of which this defendant was found guilty. On consideration by the Seventh District Court of Appeals, the judgment of the trial court was affirmed.

Appeal was taken to the Ohio Supreme Court and

upon motion to dismiss the appeal was dismissed on July 13, 1964. In the assignment of errors to the Supreme Court of Ohio, three assignments were made.

1. The Court erred in failing to dismiss two alternate jurors when the cause was finally submitted and thereafter permitted said alternate jurors to accompany and fraternize with the jury who had been permitted to discontinue deliberations during the dinner hour which procedure was in violation of law and in violation of the constitutional rights of the defendant-appellant.

2. The court erred in failing to sustain defendant-appellant's motion at the close of the State's case and at the close of all the evidence.

3. The verdict of the jury and the judgment of the court was contrary to law and against the manifest weight of the evidence.

An application for rehearing was made and denied and this petition for writ of certiorari was thereupon submitted.

QUESTIONS PRESENTED.

(1) Did the determination by the trial court that number slips found in the auto of persons whom defendant was rendezvousing with were admissible in evidence constitute a violation of the constitutional rights of the defendant when no objection was made as to the legality of the search at either the time the search was made or at the time the evidence was submitted to the court?

(2) Were petitioner's rights under the Fourteenth Amendment of the Constitution violated when the trial court permitted the alternate jurors to remain on in stand-by status after the jury had commenced its deliberations and sent the alternate jurors to dinner with the other jurors in the custody of the bailiff after adequate instruction not to discuss this case?

ARGUMENT.

Referring first to the property of the admission of number slips obtained by police officers in searching the petitioner's car, the evidence was that there was a violation of a felony statute in progress at the time of this arrest and search of defendant's person and auto, namely, the violation of Ohio Revised Code Section 2915.13. The modus operandi of defendant and his accomplices had been observed for a three-day period. Number slips were observed by police officers from the roof of the hospital using high power binoculars. Number slips were observed by police officers as they approached and passed defendant's automobile and defendant was observed proceeding to make his contact as usual. This would appear to be a clear violation of Ohio Revised Code Section 2915.13. The jury in this case also reached the same conclusion.

Ohio Revised Code Section 2935.04 provides:

> "When a felony has been committed, or there is reasonable ground to believe that a felony has been committed, any person without a warrant may arrest another whom he has reasonable cause to believe is guilty of the offense, and detain him until a warrant can be obtained."

This procedure was followed. Arrests were made before any search was made.

After the arrest of defendant, both his person and his auto were searched. The search incident to a lawful arrest has long been recognized in Ohio as well as most jurisdictions as a proper exception of the requirement of a search warrant. (*Dunning vs. Cincinnati*, 21 O. N. P. N. S. 468, *U. S. vs. Pierce*, 124 F. Supp. 264 and cases set out at 82 *A. L. R.* 782.) And it has generally been held that this right extends to automobiles. (*Decker vs. State*, 113 O. S. 512) (*Houck vs. State*, 106 O. S. 195).

Recognizing this right of search incident to an arrest, no motion to suppress the evidence was ever filed, no objection as to the legality of the method of obtaining evidence was raised at the time the evidence was introduced, only as to its relevancy, nor was it raised in the appeal to the Court of Appeals of the Seventh District of the State of Ohio, or in the appeal to the Supreme Court of the State of Ohio or in its application for rehearing. This question is raised and considered by the Courts for the first time in the Supreme Court of the United States.

Rule 15 D of the Revised Rules of the Supreme Court of the United States requires an appeal that is from the State court to set out in the statement of the case the stage of the proceedings in the court of first instance and in the appellate court at which and in the manner in which the federal questions sought to be reviewed were raised, the methods of raising them, and the way in which they were passed upon by the Court with pertinent quotations at specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears that will support the assertion that the rulings of the court were of the nature to bring the case within the statutory provisions and believed to confer jurisdiction on this Court.

Rule 16 B of the Revised Rules of the Supreme Court provides:

> "The court will receive a motion to dismiss an appeal from a state court on the ground that it does not present a substantial federal question or that the federal question sought to be reviewed was not timely or properly raised or expressly passed on;"

The Ohio Courts have long held that the forum of the reviewing Court is not a place where for the first time a point which has not been deemed of essence at the trial

and which has not been seriously pressed to the attention of the Court is to be brought to the front for the mere chance purpose of securing a reversal of the judgment which the Court finds otherwise correct. (*Patterson v. State*, 96 O. S. 90, commented upon in 3 *O. J.* (2d) 40.) It is a well settled rule of Ohio Jurisprudence that a reviewing court in appeals on question of law will only consider such errors in the lower court as were preserved by objection, ruling or otherwise in that court. (3 *O. J.* (2d) 38 and cases cited thereunder.) Likewise where the constitutional question claimed to be involved in the case was not submitted to or decided by the Court of Appeals, the Ohio Supreme Court will not consider such question. (*Clarington vs. Althear*, 120 O. S. 608, and *Cuthbertson vs. State*, 106 O. S. 658.) This is a sound rule and a rule that does not leave the appellant remediless. The post conviction proceedings of habeus corpus and federal inquiry through the district courts is still available to this appellant, but it enables the lower courts to pass upon the issue before being presented to the United States Supreme Court.

In regards to the second question submitted, namely, whether the defendant's rights under the Fourteenth Amendment were abrogated by permitting the two alternate jurors to remain on on stand-by basis and join the other jurors at dinner after proper instructions not to discuss the case, there are two provisions of the Ohio Revised Code that become pertinent. One is Ohio Revised Code Section 2313.37 pertaining to alternate jurors which provides in part:

> "* * * Such additional or alternate juror shall be sworn and seated near the jury, with equal opportunity for seeing and hearing the proceedings and

shall attend at all times upon the trial with the jury and shall obey all orders and admonitions of the court to the jury, and when the jurors are ordered kept together in a criminal case, said alternate juror shall be kept with them. Such additional or alternate juror shall be liable as a regular juror for failure to attend the trial or to obey any order or admonition of the court to the jury, shall receive the same compensation as other jurors, and except as provided in this section shall be discharged upon the final submission of the case to the jury."

Ohio Revised Code Section 2945.29 which is the criminal section pertaining to jurors, provides:

"If, before the conclusion of the *trial*, a juror becomes sick, or for other reason is unable to perform his duty, the court may order him to be discharged. In that case, if alternate jurors have been selected, one of them shall be designated to take the place of the juror so discharged."

The Supreme Court of Ohio, speaking through Judge Allen, in *Thomas vs. Mills,* 117 O. S. 119, has defined the word "trial" as follows:

"In its strict definition, the 'trial' in a criminal procedure means the proceedings in open court, after the pleadings are finished and the prosecution is otherwise ready, down to and including the rendition of the verdict."

This definition is cited in *Black's Law Dictionary.* Considering Ohio Revised Code Section 2945.29 and the definition of "trial" as given by the Ohio Supreme Court, it would appear that the right to substitute the alternate juror for a regular juror would continue on even after deliberations had commenced and this rule prevails in some states. (*People vs. Lanigan,* 140 P. (2d) 24, this be-

ing the rule in California.) However, the question of whether the court had a right to substitute jurors after deliberations began, does not need to be decided in this instance as there was no substitution after deliberations began. I only point this right of the court out to show that there was good cause for retaining the alternate jurors.

The rule pertaining to the dismissal of alternate jurors is clearly procedural and not mandatory. This has been specifically held in other procedural matters pertaining to juries as set at 50 *C. J. S.*, page 1083, citing *State vs. Jefferson*, 34 A. (2d) 881, wherein it was held:

> "The direction of the statute providing that after the court's charge, twelve jurors shall be drawn from the fourteen sworn, is procedural and not mandatory."

And most important of all is the fact that at no time when this procedure was followed, did the defendant object, nor was this raised in the Court of Appeals when presented to that Court. This would appear to be the same situation as presented to the Ohio Supreme Court in the case of *Hanlon vs. The McAlpin Company*, 175 O. S. 517, decided March 4, 1964, by this Court. The Court in that case speaking through Judge O'Neill stated, and correctly so, that "the trial court and the Court of Appeals had jurisdiction of the subject matter in this action and the parties thereto, and under these circumstances this Court will not consider or determine claimed errors which were not raised in either the trial court or in the Court of Appeals." (Citing *Babcock vs. Perkins*, 165 O. S. 185.)

Last but not least in regards to this matter, there is not one thing in the record any place to indicate that these jurors and the bailiff and the alternates did anything other than observe the instructions of the court which were:

"You understand of course while you are at dinner, do not discuss the case, any of you, and you will be in charge of the bailiff. Eat by yourselves and I am going to send the two alternates along as they are staying for dinner. You understand you do not participate in the deliberations unless there is disability of some juror."

The former was directed to the jury and the latter comment:

"You understand you do not participate in the deliberations unless there is disability of some juror."

would most clearly appear to be directed to the alternate jurors.

With respect to this complaint, it is apparent that there is nothing inherently unfair, illegal or improper about permitting alternate jurors to remain on until the trial is completed. This issue was heard and decided in this case by the Ohio Supreme Court which apparently found that Ohio Revised Code Section 2313.37 was not mandatory but directory and the apparent conflict with that section and Ohio Revised Code Section 2945.29 permitted the jurors to remain on on a stand-by basis until the trial was completed which is that stage at which the verdict is rendered.

The defendant does not indicate in what way he may have been prejudiced by the practice complained of, and as a matter of fact, the record clearly indicates a lack of prejudice to the defendant. In no event can the propriety of such procedure be considered to be raised to the level of a constitutional question under the due process clause of the Fourteenth Amendment.

CONCLUSION.

It is respectfully submitted that the petition for a writ of certiorari in this case should be denied for the reason that it presents no substantial question involving a denial of petitioner's federal constitutional rights and the questions were not timely raised in the lower courts.

Respectfully submitted,

LYNN B. GRIFFITH, JR.,
Prosecuting Attorney in and for Trumbull County, Ohio.

APPENDIX A.

Statutes.

O. R. C. Section 2915.13—Penalty for promoting a "numbers game."

No person shall establish, open, set on foot, carry on, promote, make, draw, or act as "backer" or "vendor" for or on account of a scheme of chance known as "policy," "numbers game," "clearing house," or by words or terms of similar import, located in or to be drawn, paid, or carried on within or without this state, or by any of such means sell or expose for sale anything of value.

Whoever violates this section shall be fined not less than five hundred nor more than one thousand dollars and imprisoned not less than one nor more than ten years.

O. R. C. Section 2935.04—Point I—When any person may arrest.

When a felony has been committed, or there is reasonable ground to believe that a felony has been committed, any person without a warrant may arrest another whom he has reasonable cause to believe is guilty of the offense, and detain him until a warrant can be obtained.

O. R. C. Section 2945.29—Point II—Jurors becoming unable to perform duties.

If, before the conclusion of the trial, a juror becomes sick, or for other reason is unable to perform his duty, the court may order him to be discharged. In that case, if alternate jurors have been selected, one of them shall be designated to take the place of the juror so discharged. If after all alternate jurors have been made regular jurors, a juror becomes too incapacitated to perform his duty, and has been discharged by the court, a new juror may be

sworn and the trial begin anew, or the jury may be discharged and a new jury then or thereafter impaneled.

O. R. C. Section 2313.37—Duties of Alternate Juror. Point II.

In the trial in the court of common pleas of any case, civil or criminal, when it appears to the judge presiding that the trial is likely to be protracted, upon direction of the judge after the jury has been impaneled and sworn, an additional or alternate juror shall be selected in the same manner as the regular jurors in said case were selected but each party is entitled to two peremptory challenges as to such alternate juror. Such additional or alternate juror shall be sworn and seated near the jury, with equal opportunity for seeing and hearing the proceedings and shall attend at all times upon the trial with the jury and shall obey all orders and admonitions of the court to the jury, and when the jurors are ordered kept together in a criminal case, said alternate juror shall be kept with them. Such additional or alternate juror shall be liable as a regular juror for failure to attend the trial or to obey any order or admonition of the court to the jury, shall receive the same compensation as other jurors, and except as provided in this section shall be discharged upon the final submission of the case to the jury. If before the final submission of the case to the jury a juror becomes incapacitated or disqualified he may be discharged by the judge, in which case, or if a juror dies, upon the order of the judge, said additional or alternate juror shall become one of the jury and serve in all respects as though selected as an original juror.

APPENDIX B.

Opinion of the Court of Appeals of Trumbull County, Ohio.

FRANCE, J. of the Seventh District Court of Appeals

This appeal is from sentence of defendant, following jury verdict of guilty by the Court of Common Pleas, Trumbull County, on a charge of setting on foot or carrying on a scheme of chance known as a numbers game.

The arrest which resulted in indictment and trial, came about as a result of an unusual opportunity accorded to the Youngstown Police Department to study and record the activities of numbers or "bug" operators at a transfer station of the racket. Receiving information that the parking lot of the North Side Hospital (physically located in Trumbull County) was being used as this station, the police stationed an officer on the hospital roof with binoculars and camera with a telephoto lens. For a period of three days this officer watched the movements of defendant and others, including their actions, in transferring brown paper bags and in counting green and white slips of paper. He also made careful note of the timing of the operation.

Acting on this study, the trap was sprung on October 5, 1962. As defendant and others commenced to perform movements virtually identical with those previously observed, officers emerged from concealment in cars and shrubbery, blocked the exit, surrounded and arrested defendant and three others, and scooped up quantities of evidence including filled out "bug slips," a supply of blank slips, money including a quantity of small coins and coin wrappers. Immediately after arresting defendant and the others, one of the officers drove an arrestee's car over a previously observed route and scooped up other persons who followed a previously observed pattern of behavior with regard to it.

The three others, arrested with defendant, pleaded guilty to participation in a numbers operation, had served their sentences, and were used by the state as witnesses.

Two errors are assigned, the first of which relates to the admission of certain items of evidence over defendant's objection.

The first item claimed to be improperly admitted was a brown paper bag containing 103 slips identified as bug slips found in the front seat of an automobile in possession of an R. J. Manuel and parked close to defendant's car. It is claimed that there was nothing to connect this bag with defendant. Absent the testimony and pictures of the officer stationed on the hospital roof on previous days, this is true. But the testimony of this officer as to the repeated transfer of similar bags between the same people and the same cars on three previous days, establishes a pattern on which a jury not only could but, if they believed the testimony, should find that the bag and its contents were intended to be handled by defendant and that defendant fully expected to receive the bag in question on that day, and that he was prevented from doing so only by the early arrest of all concerned. The exhibit was properly admitted into evidence.

The second item of evidence of which defendant complains is an admission by defendant, on cross-examination, that he had purchased a Federal Gambling Stamp for the current year. In *State v. Curry,* 92 Ohio App. 1, admission of such evidence in chief is approved despite objection, based on public policy, that the use of such evidence will seriously disrupt the application of, and impair voluntary compliance with, a federal taxing statute.

In this case we are not concerned with the use of such evidence to establish the body of the crime. Defendant took the stand in his own behalf and offered evidence, not only that his gambling days were over, that admitted

previous convictions for participation in the "bug" were either long past, framed by numbers operators with his knowledge to protect someone else or sincerely repented of, but that in the recent past he had been a hard working, law abiding citizen presumably without interest or participation in gambling. Without prolonged discussion of the merits of using Gambling Stamp ownership in proof of gambling as a crime, we think it perfectly proper to use the fact of such ownership for impeachment purposes when a defendant, *as a witness*, puts his character and his eschewal of gambling activities in issue.

The first assignment of error is not well made.

The second assignment relates to the weight of the evidence and, in effect, argues that the jury was bound to accept defendant's story in explanation of his presence and receipt of money in small amounts at the spot on successive days. This far-fetched explanation was one for the jury to believe or disbelieve. They obviously chose to disbelieve it and, on reading this story in cold typescript, we agree that they could scarcely do otherwise.

We have studied the voluminous bill of exceptions and the mountain of exhibits with care and are impressed, not only with the wealth of competent and relevant evidence produced against defendant, but with the care with which his rights were safeguarded by an extremely able and conscientious trial judge.

We find no assignment of error well made. The judgment and sentence of the trial court is affirmed.

APPROVED:

JAMES G. FRANCE,
Judge.

JONES, J., Concurs.
BROWN, P. J., Concurs.

APPENDIX C.

Appellant's Assignment of Errors in the Supreme Court of Ohio.

1. The court erred in failing to dismiss two alternate jurors when the cause was finally submitted, and thereafter permitted said alternate jurors to accompany and fraternize with the jury who had been permitted to discontinue deliberations during the dinner hour, which procedure was in violation of law and in violation of the constitutional rights of the defendant-appellant.

2. The court erred in failing to sustain defendant-appellant's motion at the close of the State's case and at the close of all the evidence.

3. The verdict of the jury and the judgment of the court was contrary to law and against the manifest weight of the evidence.